Office - Supreme Court, U. S.
FILED
JUN 4 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1249.

SAMUEL LEHRER,
Petitioner.

vs.

THOMAS NICKOLOPULOS,
Respondent.

BRIEF OF RESPONDENT.

ERNEST C. LUM,
Counsel for Respondent,
Office and Post Office Address,
605 Broad Street,
Newark 2, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX.

	PAGE
Opinions of Courts Below	1
Jurisdiction	1
Statement of the Case	2
Argument	2
Point A. The petition for writ of certiorari was not filed within the time limited	2
Point B. The judgment below involved no federal question of substance not heretofore determined by this Court, or determined probably not in accordance with applicable decisions of this Court	5
Conclusion	8

CASES CITED.

Byrnes v. *Balcom*, 265 App. Div. 268, 38 N. Y. S. (2d) 801	7
Cole v. *Violette*, 319 U. S. 581, 63 S. Ct. 1204, 87 L. Ed. 1599	4
Colonial Operating Corp. v. *Hannan Sales & Service*, 265 App. Div. 411, 39 N. Y. S. (2d) 217	7
Columbus Ry. & Power Co. v. *Columbus*, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669	6
Department of Banking v. *Pink*, 317 U. S. 701, 26 L. Ed. 1109	3, 4
Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188	7

PAGE

Texas Co. v. *Hogarth Shipping Co.*, 256 U. S. 619, at 630; 41 S. Ct. 612, at 615; 65 L. Ed. 1123..... 6

Wurts v. *Hoagland*, 105 U. S. 701, 26 L. Ed. 1109.... 4

STATUTES CITED.

Federal:

28 U. S. C., Sec. 344(b) 3
28 U. S. C., Sec. 350 2
44 U. S. C., Sec. 307, pocket part..... 6

State:

N. J. P. L. 1941, Ch. 81, p. 193, ff, as amended by N. J. P. L. 1942, ch. 104, p. 365 (N. J. S. A. 2:98-28 to 2:98-34, pocket part)... 5

COURT RULES CITED.

Supreme Court of the United States, Rule 38, paragraph 5a..... 2
N. J. Court of Errors and Appeals, Rules 42 and 43..... 4

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1249.

SAMUEL LEHRER,
Petitioner,

vs.

THOMAS NICKOLOPULOS,
Respondent.

BRIEF OF RESPONDENT.

I.

Opinions of Courts Below.

The opinion of the New Jersey Court of Errors and Appeals (Tr. pp. 37-40) is reported in 132 N. J. L. 461, and 40 Atl. Rep. (2d) 794. The opinion of the New Jersey Supreme Court (Tr. pp. 29-31) is not reported, officially or unofficially.

II.

Jurisdiction.

Respondent asserts that this Court lacks jurisdiction to entertain the petition for a Writ of Certiorari, or, if

such jurisdiction exists, that it ought not to be exercised, for the following reasons:

A. The petition was not filed within the time limited by the statute, 28 United States Code, Sec. 350;

B. The record discloses that there was decided no federal question of substance not heretofore determined by this Court or probably not in accordance with applicable decisions of this Court, as required by paragraph 5a of Rule 38 of this Court.

III.

Statement of the Case.

The statement of the case contained in the Petition for Writ of Certiorari contains all pertinent facts, and will not be repeated here. However, respondent does not adopt and, in fact, denies so much of that statement as claims that a Federal question was at all involved or that the New Jersey Court of Errors and Appeals "missed" that question.

IV.

ARGUMENT.

POINT A.

The petition for writ of certiorari was not filed within the time limited.

By the statute, 28 U. S. C. Sec. 350, no writ of certiorari intended to bring any judgment or decree before the Supreme Court shall be allowed unless application therefor

be duly made within three months after the entry of such judgment or decree.

The instant application is for a writ to review a cause wherein a final judgment has been rendered or passed by the highest court of the State of New Jersey in which a decision could be had, under Section 237 of the Judicial Code (28 U. S. C. sec. 344(b)).

The cause was decided by the New Jersey Court of Errors and Appeals on January 19, 1945 (Tr. p. 37; p. 41). An "Order on Affirmance of Judgment", containing a remittitur, was filed in that Court on January 25, 1945, and it "adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed * * *" (Tr. p. 41). The order on affirmance and remittitur was filed in the lower court on February 9, 1945 (Tr. p. 41). The petition for Writ of Certiorari was filed in this Court on May 9, 1945.

Since the purpose of the application is to review a final judgment of a State court, and since the statute requires application to be made within three months after the entry of the judgment, the issue to be determined under this point is when the judgment below became a final judgment.

The test is not whether, or when, the judgment is denominated final under local rules of practice, but, rather, whether and when the order below fully adjudicated the rights of the parties, without further review being available.

Department of Banking v. *Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254.

Retention of the record for ten days after entry of the remittitur under Rule 43 of the Rules of the New Jersey Court of Errors and Appeals does not affect the finality of the judgment. That is entered and becomes final in the appellate court, certainly not later than upon entry of the remittitur in the appellate court. This is recognized by Rule 42 of the Rules of the New Jersey Court of Errors and Appeals, which provides, in part, that:

> "* * * The remittitur in case of an appeal shall contain a copy of the decree, order or judgment of this court * * *"

It follows that there was a final judgment entered in the New Jersey Court of Errors and Appeals upon the filing of the order and remittitur in that court. That occurred here on January 25, 1945, so that the time limit expired on April 25, 1945. Finality of the judgment did not await the filing of the remittitur in the New Jersey Supreme Court. The petition is, therefore, too late.

> *Wurts* v. *Hoagland*, 105 U. S. 701, 26 L. Ed. 1109;
> *Department of Banking* v. *Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254;
> *Cole* v. *Violette*, 319 U. S. 581, 63 S. Ct. 1204, 87 L. Ed. 1599.

The *Wurts* case deals specifically with the finality of a judgment of the New Jersey Court of Errors and Appeals.

POINT B.

The judgment below involved no federal question of substance not heretofore determined by this court, or determined probably not in accordance with applicable decisions of this Court.

The suit below was for the balance of unpaid rent under two leases. The defense was that the leases provided that the premises were to be used for the purpose of disposing of, selling, vending and displaying automobiles, radios, refrigerators, washing machines, and other electrical appliances and equipment; that by virtue of orders promulgated by the Federal Government "prohibiting the production and sale of the articles set forth in the leases", (Tr. p. 19) the defendant was "evicted", and he vacated the premises prior to December 1, 1942.

Respondent, plaintiff below, moved to strike out the answer (Tr. pp. 26-27). In ruling on the motion, the court necessarily considered the provisions of the orders relied on by way of defense. Consideration of these provisions, which have the force of law, and application thereof to the lease obligation, was a question for the court only, and could not have been submitted to a jury. This was by virtue of N. J. P. L. 1941, Ch. 81, p. 193, ff., as amended by N. J. P. L. 1942, Ch. 104, p. 365 (N. J. S. A. 2:98-28 to 2:98-34, pocket part), which provides that the New Jersey courts shall judicially notice the law of other jurisdictions and that the determination of such law shall be by the court and not a jury.

Judicial notice of the orders was also proper because of the fact of common knowledge thereof, and because of the provisions of the Act of July 26, 1935, Sec. 7 (49 St. 502, 44 U. S. C. Sec. 307, pocket part), which enacted that:

> "The contents of the Federal Register shall be judicially noticed, and, without prejudice to any other mode of citation, may be cited by volume and page number."

Having examined the orders relied on, the court concluded that no order prohibited the use of leased real estate for the enumerated purposes; and, further, that those orders did not go to the extent pleaded as a defense; i. e., they did not prohibit the sale of the enumerated articles (Tr., pp. 30, 39).

The applicable principle of law is the familiar one that where the continuance of the subject matter of a contract is a condition thereof, express or implied, destruction thereof renders performance impossible and absolves the parties from further liability. The principle does not apply, however, where performance is not practically cut off, but only is rendered more difficult or costly.

> *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, at 630; 41 S. Ct. 612, at 615; 65 L. Ed. 1123.

The propriety of striking out the defense is supported by the decision of this Court in *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669, where the District Court was affirmed in striking out a bill of complaint seeking to enjoin enforcement of an obligation to operate street railways at specified rates on the

ground of impossibility of performance because of an order of the National War Labor Board raising the wages of employees and thereby making the fixed rates grossly inadequate. It was pointed out that the order had not made performance impossible, though it may have rendered it more difficult or costly. There, as here, the pleading was stricken out on motion, for it was apparent that, taking the facts in their most favorable light, there was no legal excuse for failure to perform.

Respondent has no desire to refer to authorities of the State of New York, but since petitioner's only cited cases are from that State, it is pointed out that those cases were in the New York lower courts. Decisions in the Appellate Division are to the contrary, and support the correctness of an order striking an answer and entering summary judgment in cases involving the same Federal orders here relied on.

Byrnes v. *Balcom,* 265 App. Div. 268, 38 N. Y. S. (2d) 801;
Colonial Operating Corp. v. *Hannan Sales & Service,* 265 App. Div. 411, 39 N. Y. S. (2d) 217.

Finally, it is suggested that the sole issue involved and passed upon was whether the matter raised by the answer was a defense in law to an action for rent due under an agreement of lease made in New Jersey, between residents of New Jersey, and relating to real estate there situate, and that this was an issue to be determined solely according to the law of New Jersey, pursuant to the principles of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. There was no Federal question. The validity

of the governmental orders was not involved, nor was there any colorable claim that they purported to deal directly with the subject of the action. They were pertinent only insofar as it was necessary to examine them to determine if they went so far as to prohibit the sale of the enumerated articles, thereby making the permitted use of the leased premises no longer possible.

Conclusion.

The prayer of the petition should be denied; first, because it was filed beyond the period permitted, and second, because it is clear from the record that there is involved no Federal question of substance not heretofore decided by this Court, and that no Federal question is shown to have been decided probably not in accordance with applicable decisions of this court.

Respectfully submitted,

ERNEST C. LUM,
Counsel for Respondent.